DISTRICT COURT, DENVER, COLORADO 1437 Bannock Denver, CO 80202	DATE FILED: October 18, 2019 3:01 PM CASE NUMBER: 2019CV32304
Plaintiff(s): SCHOOL DISTRICT 14 CLASSROOM TEACHERS' ASSOCIATION v. Defendant(s): COLORADO STATE BOARD OF EDUCATION and ADAMS COUNTY SCHOOL DISTRICT 14 BOARD OF EDUCATION	▯ COURT USE ONLY ▯ Case Number(s): 2019CV32304 Courtroom: 269

OMNIBUS ORDER RE: DEFENDANT COLORADO STATE BOARD OF EDUCATION'S MOTION TO DISMISS and DEFENDANT ADAMS COUNTY SCHOOL DISTRICT 14 BOARD OF EDUCATION'S MOTION TO DISMISS

This matter comes before the Court on Defendant Colorado State Board of Education's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1), filed June 25, 2019, and Defendant Adams County School District 14 Board of Education's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5), filed July 15, 2019. The Court, having reviewed the motion and the responsive briefs, the registry of actions, and applicable legal authority, Finds and Orders the following:

I. BACKGROUND

This case arises out of Defendants' actions pursuant to the Education Accountability Act of 2009 and a management contract entered into with a private entity for purposes of affecting improvement at underperforming schools in Adam's County School District 14 ("School District").

Plaintiff is the School District 14 Classroom Teachers' Association ("CTA"), a membership organization employed as the exclusive bargaining agent for the School District's teachers, other licensed professionals, and non-management employees. CTA is a party to a collective bargaining agreement with the School District.

Plaintiff filed its complaint on June 12, 2019, alleging that Defendant Colorado State Board of Education ("State Board") exceeded its constitutional and statutory authority by ordering Defendant Adams County School District 14 Board of Education ("Local Board") to assign a private entity to manage the School District. Plaintiffs further allege that the Local Board failed to perform its constitutional and statutory duties by willfully abdicating control over the public schools in its district by obeying the State Board's order and contracting with the private entity.

This case is similar to one brought by the Pueblo Education Association and two named members,[1] but here, the teachers' association is the sole plaintiff. Moreover, Plaintiff stresses that the distinguishing factor in this case is the private entity's management over an entire school district rather than just one public school.

Constitutional and Statutory Background

The general supervision of the public schools in Colorado is vested in the State Board whose powers and duties are prescribed by law. Colo. Const. Art. IX, § 1. The State Department of Education includes, *inter alia*, the State Board and the Commissioner of Education who is appointed by the State Board. Colo. Rev. Stat. § 22-2-103; Colo. Const. Art. IX, § 1.

Each public school district is governed by a local board of education elected by voters in the district. Colo. Rev. Stat. § 22-32-103(1) (2018); Colo. Const. Art. IX, § 15. Local boards possess the powers delegated to them by law, and "shall perform all duties required by law." Colo. Rev. Stat. § 22-32-103(1) (2018). Specifically, the Colorado Constitution grants local school boards "control of instruction in the public schools of their respective districts." Art. IX, § 15.

The General Assembly enacted the "Education Accountability Act of 2009," which was codified as Colo. Rev. Stat. §§ 22-11-101, *et seq.* ("Act") to hold the state, school districts, the institute, and individual public schools accountable. *Id.* The Act contemplates creation of a state review panel, and a uniform statewide system for various Department of Education actors to evaluate performance, establish accreditation categories for public school districts, report issues, and make recommendations for rewarding success and providing support for improvement at each level. *Id.*

[1] 2019 CV 302, Pueblo Education Association; Suzanne Etheredge; and Robert Donovan v. Colorado State Board of Education and Pueblo School District No. 60 Board of Education

Case Background

The School District in this case is "one of the lowest performing districts in the State of Colorado." *Exh. B to State Board's Mot. to Dismiss.*

In recent years, certain grants, programs, and other supports provided to the School District have not resulted in improvements to student test scores. *See Exh. 1 to Compl. pp. 5-7.* In 2017, the School District, itself, proposed a partnership with an external manager. In 2018, the state review panel recommended an outside entity manage the School District. *Exh. 2 to Compl., p. 1.* Plaintiff CTA did not submit anything during the 2018 accountability proceedings. *State Board's Mot. to Dismiss, p. 7.*

On November 27, 2018, the State Board directed the Local Board to identify, within 90 days, a public or private entity to manage the School District. The Local Board was then to present the selection to the State Board for approval, and, if approved, enter into a contract with that external partner ("State Board's Order"). *Exh. 1 to Compl., p. 11.* The State Board also ordered the Local Board to "give due consideration to the recommendations of the [manager] and not unreasonably withhold [its] approval." *Id., pp. 11.* The Local Board did not challenge the State Board's Order, and it went about selecting an outside entity.

At first, the Local Board selected a neighboring school district—Mapleton Public Schools ("Mapleton")—to serve as its external manager. The CTA also wrote a letter supporting Mapleton as external manager. When the Local Board presented the selection to the State Board, the State Board asked the Local Board to identify an additional partner to strengthen Mapleton's ability to manage the School District. The Local Board selected MGT and the State Board expressed its willingness to work with Mapleton and MGT in partnership. Thereafter, Mapleton "effectively faded from the picture," and the State Board officially rejected Mapleton's bid. *Compl.*, ¶ 46. The Local Board then selected MGT as its sole external manager, and the State Board approved the selection.

The School District, governed by the Local Board, contracted with MGT ("School District's Contract with MGT"). *Exh. 4 to Compl.* The contract, pursuant to the State Board's Order, grants MGT "all formal decision-making authority needed to administer the affairs and programs of the School District subject to "limitations mandated by the Colorado Constitution and statute," and to the Local Board's retained authority provided in its policy. *Id.* For action requiring

Local Board formalities, the Local Board agreed not to "unreasonably withhold" its approval. *Id. at pp. 3-4*.

Plaintiff alleges that the Local Board has unlawfully committed over 8 million public dollars to MGT, and it is Plaintiff's belief that these funds originate from a number of sources, including state and local taxes. *Compl*.

In its Complaint, Plaintiff asserted the following causes of action: (1) The Act, the State Board's Order, and the School District's contract with MGT violate Article IX, § 15 of the Colorado Constitution, which provides that local school boards "shall have control of instruction in the public schools of their respective districts,"; (2) The State Board's Order violates Article IX, § 1 of the Colorado Constitution for exceeding the constitution's grant of *general* supervisory authority (emphasis added); (3) The State Board's Order and the School District's Contract with MGT violates state statute setting forth specific duties of local boards of education; (4) The Local Board should be enjoined because it failed to perform its statutory duties; (5) Plaintiff and its members were adversely affected by the State Board's approval of MGT, which Plaintiff characterizes as final agency action subject to judicial review; and, (6) Plaintiff is entitled to a judgment for declaratory relief.

Defendants now move to dismiss Plaintiff's claims pursuant to C.R.C. P. 12(b)(1) and 12(b)(5).

II. STANDARD OF REVIEW

A motion to dismiss for lack of subject matter jurisdiction is governed by C.R.C.P. 12(b)(1). Under the Colorado constitution, district courts have general subject matter jurisdiction in civil cases with the power to consider questions of law and of equity. *SR Condos., LLC v. K. C. Constr., Inc.*, 176 P.3d 866, 869 (Colo. App. 2007). The legislature may limit the jurisdiction of a district court; however, to be effective, the limitation must be explicit. *Id.* at 869. "Subject matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment, not its authority to enter a particular judgment in that class." *Id.* In determining whether subject matter jurisdiction exists, a court must consider the facts alleged and the relief requested. *Id.*

In considering a Rule 12(b)(1) motion, a trial court is authorized to make appropriate factual findings relating to its subject matter jurisdiction and need not treat the facts alleged in the

complaint as true. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). Where the parties have presented all relevant evidence to the court and the underlying facts relating to jurisdiction are undisputed, the trial court may decide the issue as a matter of law. *Id.* If, however, jurisdictional facts are in dispute, the trial court may hold an evidentiary hearing to resolve any dispute upon which the existence of subject matter jurisdiction depends. *Trinity Broadcasting of Denver v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993). A court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. *Id.*

Under C.R.C.P. 12(b)(5), a party may move to dismiss the other party's claims for "failure to state a claim upon which relief can be granted." A complaint may be dismissed if the substantive law does not support the claims asserted, or if the plaintiff's factual allegations do not, as a matter of law, support the claim for relief. *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

III. ANALYSIS

Plaintiff's claims turn on allegations of Defendants' constitutional and statutory violations. Specifically, the allegations are premised on the notion that the State Board overstepped its authority and encroached on local control, and that the Local Board impermissibly delegated its authority. Defendants assert that this Court does not have subject matter jurisdiction over this matter because Plaintiff lacks standing and, as a result, the complaint fails to state a claim for relief. The Court will address the Defendants' C.R.C.P. 12(b)(1) Motion to Dismiss and C.R.C.P. 12(b)(5) Motion to Dismiss in turn.

A. Subject Matter Jurisdiction – Standing

Defendants argue that this Court does not have subject matter jurisdiction over the Plaintiff's claims because the Plaintiff lacks standing in its own right, it cannot claim associational standing, and its plea for judicial review under the Administrative Procedure Act is time-barred.

A plaintiff bears the burden of proving that the court has subject matter jurisdiction over the dispute. *City of Boulder v. Public Service Company of Colorado*, 420 P.3d 289, 293 (Colo. 2018). A court does not have subject matter jurisdiction if a plaintiff lacks standing to invoke its judicial power. *Pueblo School Dist. No. 60 v. Colorado High School Activities Ass'n*, 30 P.3d 752, 753 (Colo. App. 2000). To establish standing under Colorado law, a plaintiff must show the

following: (1) Plaintiff suffered an injury-in-fact; and (2) Injury was to a legally protected interest. *Reeves-Toney v. School District No. 1 in City and County of Denver*, 442 P.3d 81, 86 (Colo. 2019).

Defendants argue that Plaintiff has failed to demonstrate injury-in-fact to a legally protected interest, and thus the CTA does not have standing in its own right.

1. Injury-in-Fact

The injury-in-fact prong requires Plaintiff to show "a concrete adverseness which sharpens the presentation of issues that parties argue to the courts." *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). Standing cannot be conveyed by "the remote possibility of a future injury nor an injury that is overly 'indirect and incidental' to the defendant's action." *Id.*

While the Colorado Supreme Court has held that "[d]eprivations of many legally created rights, although themselves intangible, are nevertheless injuries-in-fact," none of the Plaintiff's allegations satisfies the injury-in-fact prong.

Plaintiff alleges that the Local Board's delegation of authority, as a result of the School District's Contract with MGT, will interfere with CTA's collective bargaining agreement with the School District. Plaintiff claims that the management contract with MGT impairs its right under the collective bargaining agreement to negotiate with the Local Board. Plaintiff also argues that the collective bargaining agreement requires that the Local Board's bargaining team be selected by the superintendent, which is now impossible because the School District allegedly no longer employs a superintendent.[2]

Plaintiff's concerns are misguided. No provision in the School District's contract with MGT enables MGT to replace the Local Board in its bargaining agreement with CTA. *See Exh. 1 to Plaintiff's Resp. to State Board.* Furthermore, no provision grants the Plaintiff a contractual right to choose, specifically, who represents the Local Board in negotiations, nor does any provision dictate who the superintendent must select to represent the Local Board in bargaining. *See id.* In fact, the management contract explicates that it is subject to the limitations of the Colorado constitution, statute, and the Local Board's retained authority. *Id. at p. 1*. Finally, the Local Board affirmed it will honor the collective bargaining agreement with CTA. *Local Board's Reply at n. 1*.

[2] Defendants disagree that the School District has no superintendent and cite to the School District's webpage listing of the School District's acting superintendent. This Court believes it is unlikely that there is no one acting in the capacity as superintendent and views Plaintiff's claim that the School District's lack of superintendent results in injury to that provision of the collective bargaining agreement as implausible.

Furthermore, designating representatives is an operational decision within the Local Board's purview. Indeed, local boards of education *are* permitted to delegate. In interpreting Colo. Rev. Stat. § 22-32-109 and -110, the Colorado Supreme Court reasoned that the powers and duties granted to school boards by the legislature do not define the scope of delegable functions. *Fremont Re-1 School Dist. v. Jacobs*, 737 P.2d 816, 818 (Colo. 1987) (opting for a more liberal and flexible approach to administrative delegation, which is required for school boards to function smoothly since they have grown in size and complexity).

Plaintiff appears to misinterpret both MGT's role under the management contract and the Local Board's obligations under the collective bargaining agreement. The State and Local Board actions of which Plaintiff complains do not injure CTA's own ability to negotiate. Aside from asserting the mere fact that the management contract will change the Local Board's bargaining representative, which does not appear to be prohibited by any contractual, constitutional, or statutory provision, Plaintiff does no more to allege how this change to the Local Board's bargaining team will result in injury-in-fact to the CTA, specifically.

Indirect and incidental injuries cannot give rise to standing. *Ainscough*, 90 P.3d at 856. Because Plaintiff does not articulate any direct, non-incidental injuries to the collective bargaining agreement or to itself, caused by the State or Local Boards' actions, this Court finds that Plaintiff's allegation that CTA's right to negotiate with the Local Board has been injured, without more, is insufficient to demonstrate injury-in-fact.

2. Legally Protected Interest

In addition to demonstrating injury-in-fact, Plaintiff must show that the injury is to a legally protected interest: "An interest is legally protected if the constitution, common law, or a statute, rule, or regulation provides the plaintiff with a claim for relief." *Reeves v. City of Fort Collins*, 170 P.3d 850, 851 (Colo. App. 2007). A legally protected interest may also be one that is "tangible or economic such as one of property, one arising out of contract, one protected against tortious invasions, or one founded on a statute which confers a privilege… On the other hand, the right may protect something intangible such as… an interest in having a government that acts within the boundaries of our state constitution." *Ainscough*, 90 P.3d at 856.

Plaintiff argues that its legally protected interest is in its contractual rights arising out of the collective bargaining agreement with the School District. The "injury" it claims is the State

and Local Boards' general interference with those contractual rights. Plaintiff, however, does not have a contractual right to choose who, specifically, represents the Local Board in negotiations. Thus, the Court finds that Plaintiff cannot claim a legally protected interest in who represents the Local Board as the bargaining agent.

Plaintiff also alleges that the State Board impermissibly ordered the Local Board to cede all meaningful control over the School District by contracting with MGT, infringing upon a constitutional guarantee of "local control."

Plaintiff cites to *City of Northglenn v. Bd. Of Cty. Comm'rs*, where a division of the Colorado court of appeals found that the plaintiff cities had standing because the Colorado Constitution confers upon home rule cities a legally protected interest in its local concerns, and the cities would suffer an injury to this interest. 411 P.3d 1139 (Colo. App. 2016). Ironically, the *City of Northglenn* case demonstrates that if any party here is to have standing it is the School District, not the CTA. Plaintiff's allegation that the State Board encroached on the Local Board's autonomy does not give the Plaintiff a legally protected interest for which it can seek relief because the proper party to claim injury by the State Board's Order would be the Local Board, not the Plaintiff. *See Reeves*, 170 P.3d. The challenged order directs the Local Board and School District, not its employees. The constitutional and statutory provisions at issue contemplate the authority of the local school boards, not the rights of individual teachers or associations. The interests that teachers or associations may have with regards to these constitutional and statutory provisions are "more remote," and do not afford the Plaintiff standing. *Id*. at 86 (distinguishing between litigants who have a right to raise a legal argument or claim and those whose interests are more remote and must address their grievances in a different manner). Notably, it was the School District that initially proposed outside management to help it turn around performance, indicating that the School District and Local Board did, in fact, exercise their local authority. Additionally, nothing in the local control clause that Plaintiff invokes precludes a school board from delegating its authority. COLO. CONST. Art. IX, Sec. 15.

Thus, because Plaintiff does not explain how the "local control" provisions protect *its* legal interests, or how statutes explaining the duties of the State and Local Board protect *its* rights, this Court finds that Plaintiff has failed to demonstrate standing as a result of the Local Board's allegedly impermissible abrogation of its authority.

3. Associational Standing

An association may have standing to seek judicial relief for injuries to rights of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; *and* (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. *Colorado Manufactured Housing Ass'n v. Pueblo County*, 857 P.2d 507, 514 (Colo. App. 1993).

Plaintiff claims CTA has associational standing because (1) its individual members have taxpayer standing, (2) CTA seeks to protect interests that are germane to its purpose of advancing the interests of the teachers it represents, and (3) the claims and relief requested do not require the participation of individual CTA members.

Defendants contend that because Plaintiff is attempting to demonstrate associational standing under the theory that CTA's individual members have taxpayer standing, it is the taxpayers' interests that must be germane to the organization's purpose in order to confer associational standing.

Colorado case law has recognized "broad taxpayer standing" for citizens to sue to protect "great public concern," however, the injury-in-fact requirement limits this doctrine when plaintiffs challenge allegedly unlawful government action. *Ainscough,* 90 P.3d at 856; *Reeves-Toney,* 442 P.3d at 86. The Colorado Supreme Court recently held that to rely on one's status as a taxpayer to confer standing, a plaintiff must demonstrate a "clear nexus" between their taxpayer status and the challenged government action. *Id*. A plaintiff demonstrates this clear nexus "when she challenges the allegedly *unconstitutional expenditure of public funds* to which she has contributed by her payment of taxes." *Hickenlooper v. Freedom from Religion Foundation, Inc.*, 338 P.3d 1002, 1008 (Colo. 2014) (emphasis added) (rejecting the argument that certain costs incidental to the issuance of allegedly unconstitutional proclamations could establish the requisite nexus). *See also Reeves-Toney,* 442 P.3d at 86 (summarizing Colorado cases where the court found taxpayer standing: "In each of these cases, the alleged unlawful government action concerned the alleged misappropriation or misuse of taxpayer money.").

Plaintiff contends that its individual members would have standing in their own right because they have suffered injuries by virtue of their taxpayer status. In an attempt to demonstrate the nexus between their status and the challenged management contract with MGT, Plaintiff

alleges that its members' tax dollars are funding an unconstitutional delegation of the Local Board's authority.

Colorado Union of Taxpayers Foundation v. City of Aspen indicates that the first criterion of the individual members' standing and the second criterion of the organization's purpose are, indeed, related. 418 P.3d 506 (Colo. 2018) (finding associational standing because the organization's members had taxpayer standing and the organization was formed to educate the public as to the dangers of excessive taxation). Thus, while protection of the contractual rights under CTA's collective bargaining agreement may be germane to its purpose of advancing the interests of the teachers it represents, Plaintiff does not go so far as to say that *taxpayer interests* are germane to the CTA's purpose.

This Court must consider the character of the actual expenditure as dispositive. As noted by the Defendants, the unconstitutional actions that Plaintiff complains about are the State Board's Order (allegedly exceeding the State Board's constitutional authority) and the School District's Contract with MGT (allegedly abdicating the Local Board's constitutional duties). The Plaintiff does not assert that the School District's payment to a contracted third party is, in itself, unconstitutional. Indeed, local school boards are not prohibited from using their allocated public funds to pay for services. Colo. Rev. Stat. § 22-32-122(1) (2018). The Local Board's compensation for MGT's management services was within its right to procure because it constituted lawful payment to a contracted third party in exchange for services, as permitted by the aforementioned statute. Thus, this Court finds that because the actual expenditure of the taxpayers' dollars was not unconstitutional, it cannot create the nexus to satisfy taxpayer standing.

The Court concludes that Plaintiff has not demonstrated taxpayer standing for the CTA's individual members. *Supra p. 7*. And, even had it met the first criterion of the associational standing test, Plaintiff did not assert that taxpayer interests are germane to the CTA's organizational purpose.

4. APA Standing

To have standing under the state Administrative Procedure Act, the party seeking review must be "adversely affected or aggrieved" by the agency action, and must file its claim within 35 days of the agency action. Colo. Rev. Stat. § 24-4-106(4).

Plaintiff argues that its complaint was timely filed on June 12, 2019, within 35 days of the May 9, 2019, State Board approval of MGT as the management entity. It is this action that Plaintiff claims tolls the jurisdictional deadline, not the November 2018 State Board Order. Plaintiff asserts that the approval of MGT is the relevant event because that action is what triggered the Local Board's deadline to enter into the contract with MGT, which then "set in motion" CTA's "injuries." *Plaintiff Resp. to State Board at p. 19.*

The Court finds that the agency action relevant to Plaintiff's Complaint and alleged "injuries" is the November 2018 State Board Order. It is from the State Board's Order that Plaintiff's alleged injuries arise. The Order directed the Local Board to identify an external manager and, upon approval, enter into a management contract with that entity. The approval of MGT did not compel the School District to contract with MGT, the State Board's Order did. The Order also enumerated the terms of the management contract that Plaintiff now asserts "injure" its contractual rights under the collective bargaining agreement, so it cannot claim it held off filing for review because it was unaware of the Order's effects at that time.

Because the November 2018 Order is the relevant agency action for which Plaintiff is seeking review, and because Plaintiff challenges the State Board's Order more than five months after it was issued, this Court finds that Plaintiff's claims are untimely under the APA.

Additionally, upon the Court's earlier finding that Plaintiff did not demonstrate injury-in-fact to a legally protected interest, Plaintiff would still not have standing as an "adversely affected or aggrieved" party, even had it filed before the jurisdictional deadline.

The Plaintiff's addition of constitutional objections does not change this result.

Plaintiff contends that the time-bar does not prevent it from challenging the State and Local Boards' actions because the Education Accountability Act of 2009 is, itself, unconstitutional. Plaintiff asserts that the Act "violates Article IX, § 15 to the extent that it removes from a local school board all discretion and control as to the content of the instruction provided, with the school district's funds, to students who attend a school partially or wholly managed by a private or public entity other than the school district." *Compl.* ¶ 66.

But Plaintiff cannot challenge the constitutionality of the Act as-applied because "[t]o prevail on an as-applied constitutional challenge, the challenging party must establish that the statute is unconstitutional under the circumstances in which *the plaintiff has acted or proposes to*

act." *People v. King*, 401 P.3d 516, 517 (Colo. 2017) (emphasis added). Here, the Plaintiff is complaining of the State and Local Boards' actions under the Act, not Plaintiff's own actions.

A facial challenge, however, "can succeed only if the complaining party shows that the statute is unconstitutional in all of its applications." *People v. Boles*, 280 P.3d 55, 59 (Colo. App. 2011). Plaintiff has not shown, nor does it appear to allege, that the Act is unconstitutional in all of its applications. Instead, it argues that the Act is unconstitutional because it has allowed the State Board to exceed its "general" supervisory authority. The Court declines to define the scope of the State Board's authority. Absent a facial or as-applied challenge to the constitutionality of the Act, Plaintiff cannot argue that its constitutional challenge gives it standing.

Because the Plaintiff has failed to demonstrate injury-in-fact to a legally protected interest, either in its own right or as an association, and because Plaintiff lacks standing under the APA, the Court does not have subject matter jurisdiction over Plaintiff's claims.

B. Failure to State a Claim

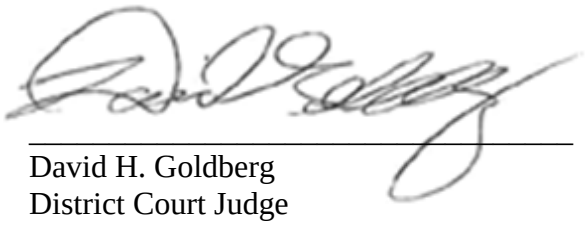
Defendant Local Board also filed a Motion to Dismiss for Failure to State a Claim Upon which Relief can be Granted under C.R.C.P. 12(b)(5). Because the Court's resolution that this case be dismissed *with prejudice* under C.R.C.P. 12(b)(1), it need not address the Motion to Dismiss for Failure to State a Claim Upon which Relief can be Granted.

IV. ORDER

Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is GRANTED. This case is DISMISSED *with prejudice*.

DATED this 18th day of October 2019

BY THE COURT:



David H. Goldberg
District Court Judge